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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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KAYLEEN SHAKESPEAR,

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Plaintiff,

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v.

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WAL-MART STORES, INC.; DOES I
through X and ROE CORPORATIONS I
through X, inclusive,

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Defendants.

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Case No. 2:12-cv-01064-MMD-PAL

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ORDER

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(Plf.'s Objections re LR IB 3-1
– dkt. no. 76)

I. SUMMARY

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Before the Court is Plaintiff Kayleen Shakespear's Objections to Magistrate
Judge's July 9, 2013, Order (dkt. no. 75) Granting Defendant Wal-Mart's Motion to
Exclude All Evidence of Future Surgery, Permanent Medical Impairment, and Future
Medical Expenses. (Dkt. no. 76.) The Court has also considered Defendant Wal-Mart
Stores, Inc.'s Opposition. (Dkt. no. 77.) For the reasons discussed below, the Motion is
denied.

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II. BACKGROUND

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This case arises out of a slip-and-fall accident Plaintiff allegedly suffered at a Wal-
Mart store in Las Vegas, Nevada on August 5, 2011. The Complaint alleges that
Defendant Wal-Mart Stores, Inc. ("Defendant") created an unreasonable dangerous
condition by failing to exercise due care in maintaining the store's floor clear of a cherry
pit that caused Plaintiff to slip and fall.

1 The basis of the underlying motion is that on February 21, 2013, the day of the
2 expert witness disclosure deadline, Plaintiff produced the expert reports of two medical
3 expert witnesses who opined about the causation of Plaintiff's injuries and the amount of
4 future medical expenses. Prior to this however, Plaintiff had not disclosed the existence
5 of the medical experts or any computation of future damages. Defendant moved to have
6 the evidence excluded, arguing that Plaintiff's non-disclosure violated her discovery
7 obligations under the Federal Rules of Civil Procedure. Defendant further asserted that
8 Plaintiff's actions were deliberately calculated to create a false impression of the scope
9 of the case, thereby preventing Defendant from adequately preparing its defense.
10 Plaintiff contended that she complied with her obligations because the experts were
11 disclosed before the deadline. Plaintiff additionally argued that even if her actions
12 resulted in some technical violation of the rules, it was harmless because Defendant was
13 aware that Plaintiff was suffering residual problems related to her injury, was being
14 treated for pain by her family doctor, and had the opportunity to designate an expert of
15 its own.

16 Magistrate Judge Leen granted Defendant's motion, holding that although Plaintiff
17 had complied with the expert disclosure obligations under Fed. R. Civ. P. 26(a)(2), she
18 nonetheless had violated her initial disclosure obligations under Fed. R. Civ. P.
19 26(a)(1)(A) and her obligation to supplement those disclosures under Fed. R. Civ. P.
20 26(e)(1)(A). Magistrate Judge Leen based her ruling on the fact that Plaintiff had been
21 examined by one of the medical experts before the date of the initial disclosures and
22 examined by the other shortly after the date of the initial disclosures. Nonetheless,
23 Plaintiff never disclosed a calculation of future damages in the initial disclosure, or any of
24 her four separate supplemental disclosures filed thereafter. Moreover, in both her
25 deposition and answers to interrogatories, Plaintiff did not disclose either expert witness,
26 even when asked directly to provide the name of any doctor with whom she had
27 consulted regarding her injuries. Finally, Magistrate Judge Leen noted that, at the time
28 of the initial disclosures, Plaintiff represented that she currently was not treating her

1 injuries and was not going to pursue a lost wages claim. For this purpose, the scheduling
 2 order contained a provision whereby Defendant reserved its right to pursue an
 3 Independent Medical Evaluation ("IME") if Plaintiff resumed treatment or claimed
 4 unresolved injury requiring future treatment. Magistrate Judge Leen concluded that
 5 Plaintiff's non-disclosure was a deliberate and calculated tactic to prevent Defendant
 6 from seeking the IME and designating an expert for its case-in-chief. Magistrate Judge
 7 Leen granted the Motion and excluded the experts' testimonies.

8 Plaintiff then brought these objections pursuant to Fed. R. Civ. P. 72(a) and Local
 9 Rule IB 3-1(a). Plaintiff argues that Magistrate Judge Leen's Order was contrary to law
 10 and its determinations of fact are clearly erroneous. Plaintiff requests reversal of
 11 Magistrate Judge Leen's Order.

12 **III. DISCUSSION**

13 **A. Legal Standard**

14 Magistrate judges are authorized to resolve pretrial matters subject to district
 15 court review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. §
 16 636(b)(1)(A); see also Fed. R. Civ. P. 72(a); L.R. IB 3-1(a) ("A district judge may
 17 reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case
 18 pursuant to LR IB 1-3, where it has been shown that the magistrate judge's ruling is
 19 clearly erroneous or contrary to law."). A magistrate judge's order is "clearly erroneous"
 20 if the court has "a definite and firm conviction that a mistake has been committed." See
 21 *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Burdick v. Comm'r IRS*,
 22 979 F.2d 1369, 1370 (9th Cir. 1992). When reviewing the order, however, the magistrate
 23 judge "is afforded broad discretion, which will be overruled only if abused." *Columbia*
 24 *Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 446 (C.D. Cal. 2007). The district judge "may
 25 not simply substitute its judgment" for that of the magistrate judge. *Grimes v. City and*
 26 *County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991) (*citing United States v. BNS*,
 27 *Inc.*, 858 F.2d 456, 464 (9th Cir. 1988)).

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1 **B. Analysis**

2 Plaintiff first asserts that Magistrate Judge Leen "adopted Wal-Mart's version of
3 the facts in the July 8, 2013, Order and reached independent findings of facts (sic) that
4 are clearly erroneous." (Dkt. no. 76 at 11.) Plaintiff further contends that due to these
5 clearly erroneous findings, Magistrate Judge Leen's determination that Plaintiff had
6 violated Fed. R. Civ. P. 26(a)(1)(A) was contrary to law. However, the Court does not
7 agree. Plaintiff has not articulated clearly erroneous findings, but simply her own
8 disagreement with the Magistrate Judge's conclusions. Further, it is Plaintiff, not the
9 Magistrate Judge, who misapplies the law.

10 All of Plaintiff's assertions of clearly erroneous determinations relate to one of five
11 basic contentions, all of which are flawed. First, Plaintiff asserts that her description of
12 future damages as "to be determined" was in compliance with Rule 26(a)(1)(A) because
13 it supplied all the information reasonably available at the time of the initial disclosure and
14 each subsequent supplemental disclosure. Plaintiff argues that Magistrate Judge Leen's
15 determination that information relating to the amount of future damages was reasonably
16 available before the expert disclosure deadline was clearly erroneous because Plaintiff
17 needed expert input on the calculation of future damages, and her experts did not
18 complete their reports before February 2013. Plaintiff supports her argument with
19 statements from her experts explaining that the period between examination and final
20 report was used to conduct a review of her past medical records.

21 Magistrate Judge Leen however, did not believe that *no information* related to the
22 cost of future medical expenses was ever reasonably available to Plaintiff before the
23 finalization of the expert reports. Plaintiff was first examined on August 1, 2012, more
24 than six months before disclosure of the future damages calculation. Even if time was
25 needed for reviewing past medical records, that review would be more pertinent to the
26 causation of the injury, rather than a projection of future medical costs. More importantly,
27 however, a party's obligations under Rule 26(a)(1) are not excused due to a failure to
28 fully investigate. Fed. R. Civ. P. 26(a)(1)(E). Thus, even accepting Plaintiff's excuse that

1 she was simply waiting on submission of her experts' reports, she still had a duty to
2 inquire and report the information reasonably available. The Court also notes that
3 Plaintiff's last supplemental disclosure was filed after receiving a final report from one of
4 her experts but, nonetheless, it still omitted any calculation of future damages.
5 Consequently, the Magistrate Judge's findings relating to this contention are not clearly
6 erroneous or contrary to law.

7 Second, Plaintiff asserts that Magistrate Judge Leen's determination that her
8 answer to interrogatories and answers to deposition questions were evasive and
9 misleading was clearly erroneous because disclosure of her experts was not required
10 under Fed. R. Civ. P. 26(b)(4)(D). This contention has no merit. Under Fed. R. Civ. P.
11 33(b)(4), any objection not stated in a response to an interrogatory is waived. As Plaintiff
12 did not state a Rule 26(b)(4)(D) objection in her responses to the interrogatories, it
13 cannot be raised here. Additionally, there was no objection stated to any question in the
14 deposition. Finally, Plaintiff's failure to raise this argument in its opposition to
15 Defendant's motion before the Magistrate Judge also makes it improperly raised for the
16 first time here. See *Apple Inc. v. Samsung Electronics Co., Ltd.*, 888 F. Supp. 2d 976,
17 991 (N.D. Cal. 2012).

18 More fundamentally, however, the Court finds Plaintiff's argument to be
19 disingenuous. Rule 26(b)(4)(D) deals only with experts "not expected to be called as a
20 witness at trial." Here, Plaintiff claims that she could not compute future damages without
21 the aid of her experts. As such, her experts would certainly have to be called as
22 witnesses at trial to prove the cost of future medical treatment. Further, Plaintiff's
23 argument that her fall was the proximate cause of her injuries also rests heavily on her
24 expert's testimony. (See dkt. no. 66.) For this reason, it is difficult to believe that Plaintiff
25 consulted with these experts simply for trial preparation and without any intent of calling
26 them as witnesses. The Magistrate Judge's findings relating to this contention are not
27 clearly erroneous or contrary to law.

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1 Third, Plaintiff argues that even if her failure to disclose was a violation, that
2 violation was not prejudicial or harmful because Defendant was on notice of Plaintiff's
3 continued medical problems and treatment. Accordingly, Plaintiff argues, Defendant
4 could have requested an IME and designated an expert before the deadline, but chose
5 not to. Plaintiff notes that she consistently represented that she had continual medical
6 problems related to her injury, and even though she was not being treated at the time of
7 the initial disclosures, she consistently represented in the supplemental disclosures that
8 she was receiving treatment from her family doctor and taking medication for occasional
9 pain. Plaintiff argues that this put Defendant on notice of future damages and triggered
10 its right to request an IME.

11 What Plaintiff ignores in her argument is that her half-truth responses in her
12 supplemental disclosures, answers to interrogatories, and her deposition were
13 completely misleading. By not disclosing that her three medical evaluations, with two
14 medical experts, and her request to one of those experts to prepare a life care plan and
15 assess permanent impairment, Plaintiff created the perception that the scope of the trial
16 was limited to damages for medical expenses of approximately \$42,000. Defendant
17 relied on Plaintiff's representations that she had not consulted with other medical experts
18 in determining to not request an IME and retain their own experts. Magistrate Judge
19 Leen found that Plaintiff had "engaged in a calculated strategy to deprive [Defendant] of
20 an opportunity to retain its own experts and conduct an IME." The evidence in the
21 record supports this reasonable conclusion. Consequently, the Magistrate Judge's
22 findings relating to this contention are not clearly erroneous or contrary to law.

23 Fourth, Plaintiff argues that any violation was not prejudicial or harmful because
24 she agreed to submit to an IME after the expert disclosure deadline, provided the IME
25 focused solely on rebuttal of the experts' opinions relating to future damages. Plaintiff
26 asserts that Magistrate Judge Leen erred, because after the expert disclosure deadline,
27 only rebuttal experts can be identified, and rebuttal expert testimony is limited in scope.
28 Plaintiff's argument attempts to side-step the fact that her own misrepresentations were

1 the reason that Defendant did not seek its own expert before the deadline. Plaintiff is
 2 correct in her assertions relating to rebuttal expert testimony; however, those rules
 3 cannot excuse or absolve her own violations of other discovery rules. Thus, the
 4 Magistrate Judge did not err.

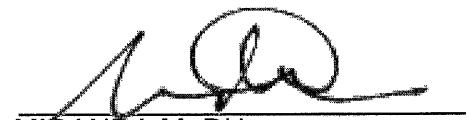
5 Finally, Plaintiff argues that Magistrate Judge Leen's Order renders the provisions
 6 governing disclosure of experts in Rule 26(a)(2) meaningless, and is contrary to the
 7 public policy favoring decisions on the merits. Plaintiff contends that if she is required to
 8 disclose her experts at the time of the initial disclosures, it renders the expert disclosure
 9 date superfluous. However, Magistrate Judge Leen correctly stated that although
 10 experts need not be disclosed in initial disclosures, "the expert disclosure deadline does
 11 not excuse Plaintiff from her other discovery disclosure obligations" — such as
 12 computation of damages — or from her discovery obligations of providing complete and
 13 truthful answers to interrogatories and deposition questions. Additionally, although there
 14 is a public policy to hear cases on their merits, there is also a public policy against trial
 15 by ambush. For these reasons the Federal Rules of Civil Procedure require disclosures
 16 and set deadlines. The Court agrees with Magistrate Judge Leen that Plaintiff's attempt
 17 to circumvent those rules and twist them to her advantage was indefensible. For this
 18 reason, the Court denies Plaintiff's objections.

19 **IV. CONCLUSION**

20 It is therefore ordered that Plaintiff Kayleen Shakespear's Objections to
 21 Magistrate Judge's July 9, 2013, Order Granting Defendant Wal-Mart's Motion to
 22 Exclude All Evidence of Future Surgery, Permanent Medical Impairment, and Future
 23 Medical Expenses (dkt. no. 56) is denied.

24 DATED THIS 9th day of December 2013.

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MIRANDA M. DU
 UNITED STATES DISTRICT JUDGE